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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LAWRENCE PERKINS, Defendant and Appellant.	B168987 (Los Angeles County Super. Ct. No. PA042668)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert J. Schuit, Judge. Affirmed.

Phillip I. Bronson, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary Sanchez and Catherine Okawa Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Lawrence Perkins appeals from the judgment entered following a jury trial resulting in his conviction of selling a controlled substance. (Health & Saf. Code, § 11352, subd. (a).) The trial court granted him probation on condition inter alia, that he spend 365 days in the county jail.

On appeal, he contends that (1) the trial court erred in denying his *Batson/Wheeler* motion (*Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*)), (2) during voir dire, the prosecutor engaged in misconduct, (3) the trial court abused its discretion by excusing one juror for cause, and (4) the trial court abused its discretion by permitting the prosecutor to impeach appellant with evidence that upon his arrest he possessed marijuana.

We affirm.

FACTS

Viewed in accordance with the usual rule of appellate review (*People* v. *Rodriguez* (1999) 20 Cal.4th 1, 11), the evidence established that on November 12, 2002, Los Angeles Police Officer Joe Garcia was working as part of a specialized eight-man narcotic "buy team." That day, Garcia was the undercover operative. In an effort to apprehend illicit narcotics dealers, in plain clothes, Garcia rode a bicycle into the park at Hansen Dam. He had difficulty locating anyone who would sell him narcotics. Finally, a "hook," Francisco Almendarez, volunteered to assist Garcia in locating and in purchasing narcotics.[1] Garcia had $40 in prerecorded currency for the purchase, two $10 bills and one $20 bill.

Almendarez contacted appellant, who after insisting that Garcia and Almendarez "change out" Garcia's currency at a local liquor store, sold Garcia a $35 quantity of cocaine. Garcia signaled the other members of his team that he had purchased the cocaine, and the "chase officers" arrested Almendarez and appellant in front of the liquor

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[1] Coarrestee Almendarez is charged in the felony complaint. However, Almendarez was not tried with appellant.

store. Almendarez had two prerecorded $10 bills, and the liquor store owner had a prerecorded $20 bill.

Appellant had sold Garcia 0.28 grams of cocaine.

DISCUSSION

1. The Claimed *Batson*/*Wheeler* Error

Appellant contends that the prosecutor exercised a peremptory challenge against Prospective Juror No. 12 (Juror No. 12) solely on the basis of group bias, and the trial court committed reversible error by failing to find the prosecutor's proffered reason for the exercise of his peremptory challenge was a pretext. We disagree.

A. The Facts

1. Juror No. 12

During jury selection, the prosecutor exercised a peremptory challenge against Juror No. 12, who was an African-American male. During the introductory voir dire, Juror No. 12 explained that he was married and lived in Santa Clarita. He worked for the Burbank Department of Water and Power, and his wife was the communications manager for the Inglewood Police Department. About five years previously, the juror had served as an alternate juror. His wife managed the dispatch department (the 911 operators for the police and the fire departments' emergency calls) for the Inglewood Police Department. Juror No. 12 had family and friends in law enforcement; he said that these friends and family worked for the California Highway Patrol and the Federal Bureau of Investigation.

Defense counsel briefly asked Juror No. 12 questions regarding his ability to deliberate with the other jurors and whether he would adhere to his opinion if, after deliberations, he was convinced that his initial conclusion about guilt or innocence was correct.

When it was the prosecutor's turn for voir dire, inter alia, the prosecutor questioned Juror No. 12 about whether his wife had contact with a lot of police officers. The colloquy was as follows: "[The Prosecutor:] Does she ever relate those stories to you? [¶] [Juror No. 12:] Yeah. [¶] [The Prosecutor:] And do you feel that those stories

would have an impact upon your ability to judge police officers in this case? [¶] [Juror No. 12:] Probably. [¶] [The Prosecutor:] Is that something you think you should talk about at sidebar, because I do? [¶] [Juror No. 12:] Repeat the question for me? [¶] [The Prosecutor:] Well, let me ask you a better question. How often does your wife talk to you about her work she does? [¶] [Juror No. 12:] Just about every day. [¶] [The Prosecutor:] And as a result of that, do you think that you have come to, let's say, opinions about police officers that somebody may not come to if their wife was not involved in the work she's involved with? [¶] [Juror No. 12:] Probably. Let me put it to you this way. I have come to the opinion that a lot of wrong have been done by police officers and a lot of police officers are good guys out there trying to make a living. So I'm pretty much on the fence. [¶] [The Prosecutor:] So do you think that you would give a police officer more credibility or less credibility or the equal level of credibility as opposed to a civilian based upon everything that your wife has shared? [¶] [Juror No. 12:] I think pretty much try to be the best judge of that law enforcement person by gestures, eye contact. [¶] [The Prosecutor:] Do you think you have an overall negative or positive view towards police officers based upon what your wife has spoken to you about? [¶] [Juror No. 12:] I don't have an opinion really. Could be good, could be bad. It all depends, because there are bad apples wherever you go. I also heard of police officers who railroad guys, meaning that they have done them wrong . . . . [¶] [The Prosecutor:] Now, [the prospective juror's name], in your civil and criminal cases, were there verdicts reached? Don't tell me what they were, but were there verdicts reached? [¶] [Juror No. 12:] Yes, on both."

2. The Prosecutor's Exercise of a Peremptory Challenge

After this exchange, when the parties were exercising their peremptory challenges, the prosecutor told the trial judge that he was troubled by Juror No. 12. He explained that the juror's wife worked with police officers, and in the prosecutor's view, the juror made some "unfairly ambiguous statements" indicating that he had some "inside knowledge" about police officers. The prosecutor said that he was concerned that the juror "had some

negative feelings about certain cops in particular and that [he might believe] that some cops railroad people."

The prosecutor told the trial court that he wanted to exercise a peremptory challenge against Juror No. 12 out of the presence of the jury to avoid "an embarrassing hearing" on the issue of whether the prosecutor would be able to exercise the peremptory challenge. The prosecutor added that he wanted to put on the record that when he asked Juror No. 12, "'Do you have any feelings about police officers?'" the juror had looked down as if he was thinking "like, Yeah, I do." Having seen Juror No. 12 look down, the prosecutor was afraid to question him further as to his impartiality. The prosecutor explained that if there was more to the juror's story, the prosecutor was afraid further questioning would cause Juror No. 12 to blurt out something about police officer credibility that would poison the entire panel.

The trial court asked the prosecutor if he was asking for an advisory opinion on exercising his peremptory challenge, and it urged the prosecutor to simply exercise the challenge if that was what he wanted to do. The prosecutor replied that whether he exercised his challenge now or later, he would be exercising a peremptory challenge against Juror No. 12.

Defense counsel made a *Batson/Wheeler* motion. She said that her client was an African-American male and that he was one of only two African-Americans on the panel.[2] She claimed that the voir dire had revealed no rational reason for concluding that Juror No. 12 was biased. She explained that the juror's wife worked for Inglewood Police Department and that he has family and friends who "are cops, C.H.P., and F.B.I." She said that although the juror acknowledged that his wife relates stories to him about things that go on at work, and there was "a lot of wrong done by cops," the juror had also "seen a lot of good cops." She argued that the juror's responses only indicated that he

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[2] The "panel" is the group of jurors from the venire assigned to a court for selection of the trial jury. (*People v. De Rosans* (1994) 27 Cal.App.4th 611, 616, fn. 1.)

was "neutral when it came to police officers " -- all the juror had said about police officers was that "he's seen the good and the bad."

The trial court ascertained that the prosecutor was exercising a challenge against the juror.

The prosecutor repeated that his voir dire had elicited a "look" that signaled him that the juror might be thinking, "Yeah, I've heard about some bad cops . . . ."

The trial court made a ruling on the *Batson/Wheeler* motion. It told defense counsel that she had not shown "it's more likely than not that the peremptory challenge has been based on an impermissible group bias" and commented that she could not carry her burden on the motion merely by showing that Juror No. 12 was an African-American. The trial court told defense counsel, "there may be some neutral explanations that [Juror No. 12] gave in your opinion, but the explanations that he did give, I think, are sufficient, I think, to allow the People to exercise a peremptory [challenge]. So I won't find that you made a prima facie case."

The trial court further explained that it was not ruling that no pattern of a discriminatory use of peremptory challenges could be established where the prosecutor excused one African-American juror. In the instant case, however, the trial court had concluded that there was no prima facie case of the impermissible use of a peremptory challenge on grounds of group bias because "the answers that the juror gave . . . could give rise to a valid peremptory challenge." The employment by the juror's wife and the answers the juror gave with respect to that employment supported the exercise of the challenge. The trial court concluded, "So I don't think I can find that the burden has shifted, so to speak, to require them to fully justify exercising the peremptory."

The prosecutor volunteered that he was willing to withdraw his challenge and question the juror outside the presence of the other jurors and to do that right now. He said, "I don't like the implication, even the implication that it's racial -- this is a racially biased thing. I don't like it. But on the other hand, I feel like because of his work and because just the look he gave me, the answers he gave me, it's like he has sort of inside knowledge that certain bad things may have happened in that particular area. And that

could poison the rest of the jurors during deliberations. And so I feel like if I don't make the motion, it could potentially prejudice the People's case unfairly; yet if I do make the motion, it looks like I am doing it for a racially improper reason and I don't want that inference. I don't even want the inference."

The trial court told the prosecutor that it understood his reluctance to exercise the challenge, but they had followed the accepted *Batson*/*Wheeler* procedure. The trial court made the finding that the defense had not proved a prima facie case of the discriminatory use of his peremptory challenges. Accordingly, the burden of justifying the peremptory challenge had not shifted to the prosecutor. The trial court told the prosecutor that "we can leave it at that or you can begin digging, I suppose, do whatever you want to do. I'm happy to let this play out further, I suppose, but I don't think it needs to."

The prosecutor and defense counsel restated their respective arguments, and the trial court told the prosecutor that it was unnecessary for him to keep protesting that he was doing the right thing. The trial court said, "So the bottom line is we'll go ahead and excuse [Juror No. 12], your record is made."

The trial court proceeded with jury selection and then swore in 12 jurors and several alternate jurors without any further objections on *Batson/Wheeler* grounds.

B. The Guiding Legal Principles

Generally, the *Batson/Wheeler* procedure is as follows: If the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination. (*People v. Reynoso* (2003) 31 Cal.4th 903, 915 (*Reynoso*).)

"'When a trial court denies a *Wheeler* motion because it finds no prima facie case of group bias was established, the reviewing court considers the entire record of voir dire.' (*People v. Davenport* (1995) 11 Cal.4th 1171, 1200 (*Davenport*).) 'If the record "suggests grounds upon which the prosecutor might reasonably have challenged" the jurors in question, we affirm.' (*People v. Howard*, *supra*, 1 Cal.4th at p. 1155, quoting

People v. Bittaker (1989) 48 Cal.3d 1046, 1092.)" (*People v. Box* (2000) 23 Cal.4th 1153, 1187-1188, fn. omitted (*Box*).)

When a trial judge expressly rules that a prima facie case was not made, and the prosecutor nevertheless puts his or her justifications on the record, the issue of whether a prima facie case was made is not moot. When an appellate court is presented with such a record and concludes that the trial court properly determined that no prima facie case was made, the appellate court need not review the adequacy of counsel's justifications for the peremptory challenges. (*Box*, *supra*, 23 Cal.4th at p. 1188; *Davenport, supra,*11 Cal.4th at pp. 1200-1201; *People v. Turner* (1994) 8 Cal.4th 137, 166-167 (*Turner*).)

The *Reynoso* court expanded on the details of the procedure at the step two and the step three stages of the *Batson/Wheeler* procedure. (*Reynoso, supra*, 31 Cal.4th at pp. 916-917.) The *Reynoso* court said: "'The second step of this process does not demand an explanation [from the prosecutor] that is persuasive, or even plausible. "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." [Citations.]' [Citation.] [¶] . . . It is not until the *third* step that the persuasiveness of the justification becomes relevant -- the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination. [Citations.] At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." (*Reynoso*, 31 Cal.4th at p. 916.) "The question for the trial court [is] this: [is] the reason given for the peremptory challenge a 'legitimate reason,' legitimate in the sense that it would not deny defendant's equal protection of law [citation], or [is] it a disingenuous reason for a peremptory challenge that was in actuality exercised solely on grounds of group bias?" (*Id*. at p. 925.)

"Jurors may be excused based on 'hunches' and even 'arbitrary' exclusion is permissible, so long as the reasons are not based on impermissible group bias. [Citation.]" (*People v. Turner*, *supra*, 8 Cal.4th at p. 165.) At step three, "[t]he party seeking to justify a suspect excusal need only offer a genuine, reasonably specific, race-

or group-neutral explanation related to the particular case being tried. [Citations.]" (*People v. Arias* (1996) 13 Cal.4th 92, 136.) The trial court then must decide based on the record as a whole whether the explanation is legitimate or whether the use of peremptory challenges was intentionally discriminatory. (*People v. Silva* (2001) 25 Cal.4th 345, 384.) The proper focus of the court's inquiry is on whether the explanation provided is subjectively genuine, not whether it is objectively reasonable. (*Reynoso*, *supra*, 31 Cal.4th at p. 924.)

Also, at step three, the trial court has an obligation to make a sincere and reasoned attempt to evaluate each stated reason as applied to the challenged jurors. (*Reynoso, supra,* 31 Cal.4th at p. 923.) "'When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient.'" (*Reynoso, supra*, 31 Cal.4th at p. 923, italics omitted, quoting from *People v. Silva, supra*, 25 Cal.4th at pp. 385-386, and *Wheeler, supra,* 22 Cal.3d at pp. 276-277.)

C. The Analysis

Appellant argues that the record shows that the trial court did not make "a sincere and reasoned effort to evaluate the genuineness and sufficiency of the prosecutor's reasons" for exercising the People's peremptory challenge, and the prosecutor's reasons were implausible or suggested bias.

Appellant's argument is flawed because it is based upon a misunderstanding of the standards of review at the various stages of the *Batson/Wheeler* procedure. The decisions in *Box, Davenport*, and *Turner* hold that where the trial court finds no prima facie case, but the prosecutor nevertheless states on the record his race-neutral reasons for exercising the challenge, the issue of a prima facie case is not moot, and a reviewing court need only examine the record to determine if substantial evidence supports the trial court's ruling of no prima facie case. (*Box*, *supra*, 23 Cal.4th at p. 1188; *Davenport, supra,*11 Cal.4th at pp. 1200-1201; *People v. Turner*, *supra*, 8 Cal.4th at pp. 166-167.) Appellant's argument

ignores the trial court's explicit finding that there was no prima facie case and that the trial court stopped at step one of the procedure. Appellant's argument assumes that the trial court was required to do more than it did here -- that it had an obligation to move past step one and to examine the genuineness of the prosecutor's reasons, ignoring the trial court's no-prima-facie-case finding. (See *Reynoso, supra*, 31 Cal.4th at pp. 918, 923.)

Because appellant's entire argument is based upon his erroneous assumption that he is at step three of the analysis, instead of at step one, his contention fails.

Further, substantial evidence supports the trial court's ruling on the *Batson/Wheeler* motion. We are unaware of the fate of the other African-American juror; thus, the record merely shows the prosecutor had one of only two African-Americans on the panel excused with a peremptory challenge. Police officer credibility was a pivotal issue in the case. The prosecutor suspected based on a hunch and on the juror's demeanor, that Juror No. 12 might be hypercritical of police officer credibility. Further, the juror's wife worked with police officers, and the juror had many friends and family in law enforcement. If the juror was hypercritical, his wife's employment and the juror's relationships might make the other jurors on the jury defer to the juror's greater experience with law enforcement officers. We agree with the trial court that based upon the entire record, the evidence supported a conclusion that the prosecutor's reason for exercising his peremptory challenge was race-neutral. (See *Box, supra*, 23 Cal.4th at pp. 1188-1189 [evidence that the jurors excused were African-Americans is not sufficient to show the discriminatory use of a peremptory challenge].)

2. The Claim of Prosecutorial Misconduct

Appellant contends that under state law, it was misconduct during voir dire for the prosecutor to detail the various reasons that the co-participant in the offense might be absent from the trial. The contention lacks merit.

A. The Facts

After a group of 12 potential jurors was selected and sworn as the trial jury, the trial court selected a number of other jurors to serve as alternates. During the voir dire of

these jurors, the prosecutor asked the potential alternates if they would be able to return a verdict of guilt if the evidence proved guilt, notwithstanding that both participants in the sale might not be tried in the current proceeding. Juror No. 4, who was already sworn as member of the trial jury, spoke up and indicated that he was confused by the prosecutor's questions. The prosecutor engaged Juror No. 4 in the following exchange: "[The Prosecutor:] In what way are you bothered? [¶] [Juror No. 4:] Well, two people and one is getting blamed. That's where I'm having a problem. I don't want to cloud anybody's mind, but ever since lunch, just kicking myself back and forth saying, well, there's two. If there's two, then there should be two here. [¶] [The Prosecutor:] But do you understand there may be -- that just -- [¶] [Juror No. 4:] Keeping the other person away. [¶] [The Prosecutor:] There are a number of reasons why another person would be -- would not be in this proceeding. The other person may have already been punished. . . . The other person may -- there may be legal reasons. There may be two separate trials, may be a million different reasons why the other person is not here. Just because the other person is not here, it doesn't mean anything with respect to this defendant's guilt or innocence. Do you understand that? [¶] [Juror No. 4:] Trying."

Defense counsel asked to approach the bench. The prosecutor asked to follow up briefly before the bench conference, and defense counsel agreed.

The prosecutor said to the jurors: "And by my last question I don't want to imply any of those things have happened or the other person -- there's no guilt or innocence having been proven or disproven with respect to the other person. Do you understand what I'm saying?" Juror No. 4 said that he understood. The prosecutor explained further: "So the other person -- you are going to hear evidence that is going to talk about two people. You need to decide this defendant's guilt or innocence based upon the law as it relates to that evidence. Will you be able to do that?" Juror No. 4 replied, "I will try."

At the bench, defense counsel moved for a mistrial on the grounds that the prosecutor's comments were "inappropriate argument" and were "improper," and that the comments had "a chilling effect" on appellant's "rights."

The prosecutor protested that he was merely questioning the jurors to make sure they understood that "they're not to speculate" on the co-participant's guilt or the reasons for his absence from the trial.

B. The Trial Court's Ruling and Admonition

The trial court agreed with defense counsel that it was a "mistake" to suggest specific reasons for the co-participant's absence, but it said that the prosecutor's comments were not "fatal." The trial court remarked that in the prosecutor's subsequent remarks, the prosecutor did a "halfway decent job" of curing the misleading comments, and the trial court also would admonish the jury on the point.

The trial court denied the motion for a mistrial. It immediately charged the jury with CALJIC No. 2.11.5, as follows: "There has been evidence in this case indicating that a person other than the defendant was or may have been involved in a crime for which the defendant is on trial. [¶] There may be many reasons why that person is not here on trial; therefore, do not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether he or she has been or will be prosecuted. Your sole duty is to decide whether the People have proved the guilt of the defendant on trial in our case."

The trial court added the following spontaneous admonition to the jury: "The reason I bring this up is because there's no evidence before you and there will be no evidence before you as to what may have happened to any other person who may have been involved. That's a matter for some other judge at some other place. Your sole job in this case is to decide this case with this defendant. So I will ask all jurors, of course [Juror No. 4] since he raised the issue, not to consider that issue for any purpose in your deliberations ultimately when you decide this case. Okay?"

The trial court ascertained that the parties had passed for cause as to the alternate jurors, and it continued the selection of the alternate jurors. The defense made no further objections with regard to the prosecutor's comments.

During its formal charge to the jury, the trial court again instructed the jury with CALJIC No. 2.11.5.

C. The Guiding Legal Principles

A prosecutor may not make a remark meant to absolve the prosecution of its burden to prove a case beyond a reasonable doubt. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1215.) Voir dire is improper when its sole purpose is to educate the prospective jurors about the particular facts of the case, to compel the jurors to commit themselves to vote in a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law. (*People v. Williams* (1981) 29 Cal.3d 392, 408-409.)

"'[C]onduct by a prosecutor . . . is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'" (*People v. Valdez* (2004) 32 Cal.4th 73, 122, quoting *People v. Earp* (1999) 20 Cal.4th 826, 858.)

D. The Analysis

Appellant complains that the prosecutor committed *Watson* error (*People v. Watson* (1956) 46 Cal.2d 818, 836) because the prosecutor crossed the line between appropriate voir dire designed to ferret out bias and prosecutorial misconduct. He urges that the objected-to voir dire was prosecutorial misconduct under state law because the comments were likely to have been interpreted by the jury in a manner that "tarred appellant with guilt by association."

Here, there was no prosecutorial misconduct on state grounds. On appeal, when a claim focuses upon comments made by the prosecutor before the jury, the question is whether "there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Morales* (2001) 25 Cal.4th 34, 44; *People v. Sanders* (1995) 11 Cal.4th 475, 526.) In the context of the entire record (see *People v. Dennis* (1998) 17 Cal.4th 468, 522), it is apparent that, without thinking through what he was actually saying, the prosecutor went too far afield in attempting to clarify his point about avoiding consideration of the co-participant's fate. Defense counsel immediately objected, and the trial court charged the jury with CALJIC No. 2.11.5 then and during its formal charge to the jury. The instruction properly

informed the jury that the individual jurors were to draw no inferences as to the defendant's guilt from the co-participant's absence from the trial. The trial court emphasized its instruction to the jury by repeating CALJIC No. 2.11.5's direction to the jurors in its own words. The prosecutor also remarked in his follow-up comments that his voir dire was not intended to suggest the actual fate of the co-participant and that his comments were not evidence, merely a list of the causes that might have resulted in the co-participant avoiding the trial. Given the context of the entire voir dire and the admonitions by the prosecutor and the trial court, there's no prosecutorial misconduct as it is not reasonably likely that the prosecutor's remarks were understood by the jurors as proof of appellant's guilt by association. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

3. Excusing A Juror for Cause

Appellant argues that the trial court abused its discretion by excusing Juror No. 4 for cause. We disagree.

At the close of the first day of trial, Juror No. 4 asked to speak to the trial court and counsel out of the presence of the other jurors. Juror No. 4 volunteered that he remembered having seen and spoken briefly to appellant when he was visiting his father, who was living in a hospice near the Hansen Dam. The juror had not seen appellant do anything wrong; appellant was just there at the Goodwill Center and recycling center. The trial court asked if there was anything in his past association with appellant that would "tilt" him one way or the other in the case. The juror replied, "There may be." He said that appellant had "seemed like a really nice guy," and he had "a little more compassion for him." The prospective juror said, "[Y]ou know, knowing someone that's struggling, and, you know, trying to avoid that side of the road. I mean, I have compassion for the gentleman." The trial court asked if the juror could put his compassion aside and be a fair juror in the case, and Juror No. 4 replied, "Yes."

The People argued that Juror No. 4 should be excused for cause because the juror had reached a conclusion about appellant's veracity and the juror, in effect, was a potential character witness for appellant in the jury room and he might support a defense

claim that appellant was a recycler, not a drug dealer. The defense objected to excusing the juror, arguing that the juror had stated that he could be impartial.

The trial court concluded that having seen appellant at a recycling center, Juror No. 4 had personal knowledge pertinent to appellant's defense. The juror had developed an opinion that appellant was a "homeless type." The juror knew there was a dramatic difference in appellant's appearance in court and his previous appearance. The trial court commented that in an abundance of caution, the better course was to excuse Juror No. 4 for cause. Accordingly, the trial court excluded the juror.

In pertinent part, Penal Code section 1089 provides: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors."

Appellant's claim is limited to the argument that there was no good cause to exclude Juror No. 4 because the juror said that he could be impartial. The argument is unpersuasive. There is ample authority that a juror's relationship to the defendant or any personal knowledge that he might have relevant to the facts of the case provides good cause for excluding him from the jury. (*Mu'Min v. Virginia* (1991) 500 U.S. 415, 422, 430 [the inquiry is whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried]; *People v. Abbott* (1956) 47 Cal.2d 362, 371-372 [juror worked in same office as defendant's brother and their desks were 25 feet apart]; *People v. Hecker* (1990) 219 Cal.App.3d 1238, 1245 [over the weekend during the trial, defendant joined a juror's church, and the juror asserted that the defendant's joining her church had the effect of interfering with her objectivity].) On this record, the trial court properly exercised its discretion by finding cause to exclude the juror from serving on appellant's jury. (*People v. Carpenter* (1999) 21 Cal.4th 1016,

1036 [the qualifications of jurors challenged for cause are matters within the wide discretion of the trial court and are seldom disturbed on appeal].)

In any event, the erroneous exclusion of a juror for cause in the process of jury selection provides no basis for overturning a judgment. Appellant had a right to have a jury of persons who were qualified and competent; he has no right to have any particular juror on his panel. (*People v. Carpenter, supra*, 21 Cal.4th at p. 1037; *People v. Holt* (1997) 15 Cal.4th 619, 655-656.)

4. The Use in Evidence of Appellant's Possession of Marijuana

Appellant contends that the trial court improperly exercised its discretion by permitting impeachment with evidence that the police officers found appellant in possession of marijuana. The contention lacks merit.

During appellant's defense testimony, he testified that he was not selling illicit narcotics when he was arrested by the buy-team officers. He claimed that he was merely out recycling that day. He acknowledged that he had on his person what is known as a cocaine pipe. However, it was broken, and he claimed that he had picked the pipe up to dispose of it so as to keep the park clean. In his testimony, he volunteered, "But I've used cocaine in the past, you know. I'm not denying that. But I wasn't using none that day."

During cross-examination, the prosecutor asked appellant about his past cocaine use. Appellant admitted that he had used cocaine previously, but not in the park. He also admitted that he had been under the influence of cocaine in the park, but not for several years.

The prosecutor approached the bench with trial counsel. The prosecutor asked the trial court to permit him to impeach appellant with a 2001 conviction for being in the park under the influence of cocaine. The prosecutor informed the trial court that appellant had the cocaine pipe on his person upon his arrest and said that appellant's story was ridiculous and it was a lie and that appellant should be impeached. He urged that (1) at the very least, he should be permitted to impeach appellant with marijuana that was on his person at arrest, as appellant's possession of marijuana impeached his claims

of innocence, (2) he was entitled to impeach appellant about caring about the condition of the park and about the safety of the people who use the park, (3) showing appellant was recently high as a kite in the park would negate the false impression that appellant was attempting to create, (4) appellant's current possession of marijuana belied his claim of no recent use of cocaine, and (5) appellant was creating a false "aura of this reformed park caretaker."

After listening to counsels' arguments, the trial court ruled that pursuant to Evidence Code section 352, the proposed impeachment was inadmissible in evidence.

The prosecutor continued his cross-examination and questioned appellant about the last time he had used cocaine. Appellant claimed that he had not used cocaine for over a year and that he had started going to church, he was reading his Bible, and God was speaking to him "every now and then."

Counsel approached the bench. The prosecutor asked the trial court to permit him to impeach appellant with his possession of marijuana.

The trial court ruled that appellant's claim that he no longer used drugs "opened up the door" to the People's inquiry about the marijuana. Trial counsel protested that the issue should be clarified before appellant was impeached because appellant may have misunderstood that the prosecutor put marijuana in the same category as cocaine. The trial court ruled that appellant's testimony created the false aura that appellant was leading a new religious life. Accordingly, appellant could be impeached with the evidence that he was arrested in possession of marijuana.

The prosecutor then asked appellant if he was using marijuana. Appellant replied, "No, sir." The prosecutor impeached appellant with a photograph of the marijuana found on his person at the time of his arrest. Appellant admitted that the photograph depicted the marijuana that was on his person at arrest.

The legal rule which applies in this instance is as follows. A trial court has the discretion to exclude impeachment evidence if it is collateral, cumulative, confusing, or misleading. (*People v. Price* (1991) 1 Cal.4th 324, 412.) The collateral matter limitation applies when the examiner elicits "otherwise irrelevant testimony on cross-examination

merely for the purpose of contradicting it." (*People v. Mayfield* (1997) 14 Cal.4th 668, 748.) A collateral matter has been defined as one that has no relevancy to prove or disprove any issue in the action. A matter collateral to an issue in the action may nevertheless be relevant to the credibility of a witness who presents evidence on an issue; always relevant for impeachment purposes are the witness's capacity to observe and the existence or nonexistence of any fact testified to by the witness. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9, citing Evid. Code, § 780, subds. (c) & (i).)

As with all relevant evidence, the trial court has broad discretion to admit or exclude impeachment evidence pursuant to Evidence Code section 352. The court is required "to weigh the evidence's probative value against the dangers of prejudice, confusion, and undue time consumption. Unless these dangers 'substantially outweigh' probative value, the objection must be overruled." (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.) "Evidence is substantially more prejudicial than probative [citation], if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome.'" (*People v. Waidla* (2000) 22 Cal.4th 690, 724.) The court's exercise of discretion will not be disturbed on appeal unless it is exercised in an arbitrary, capricious, or patently absurd manner resulting in a manifest miscarriage of justice. (*People v. Rodriguez, supra*, 20 Cal.4th at pp. 9-10.)

The trial court properly exercised its discretion in permitting the impeachment. Initially, the trial court excluded the evidence because it deemed the possession of marijuana evidence too collateral and inflammatory to be admissible at the trial. However, subsequently, appellant opened the door to the impeachment because he made broad claims that he was newly involved in religion and with God and because he implied that because of his new religious life, he was no longer involved in drug use. Appellant's marijuana possession thus became relevant and put his credibility in the proper perspective for the jury.

Appellant cites the decisions in *People v. Cardenas* (1982) 31 Cal.3d 897, 907, and *People v. Davis* (1965) 233 Cal.App.2d 156, 161 as supporting his claims that the impeachment is reversible evidentiary error. However, these decisions merely stand for

the proposition that drug addiction is inadmissible in evidence where such evidence is only marginally relevant in proving the defendant had a financial motive for committing a nondrug offense. (*People v. Holt* (1984) 37 Cal.3d 436, 450; *People v. Cardenas, supra*, 31 Cal.3d at p. 907.) The decisions do not provide a basis for the exclusion of the impeachment evidence in this case.

Because appellant tendered a denial of recent drug use as part of his defense, the People were entitled to rebut that claim. Admitting the marijuana possession into evidence was persuasive evidence rebutting the claim of recent drug use, and the impeachment's use during trial was discretionary with the trial court.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

NOTT

We concur:

_____, P. J.

BOREN

_____, J.

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